United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-7671

United States Court of Appeals

For the Second Circuit.

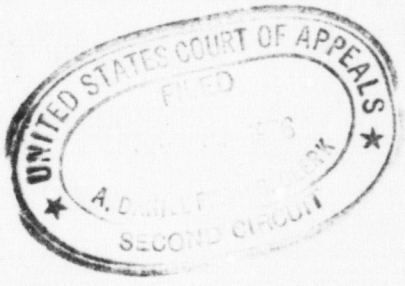
NEOCLARIOS KOUPETORIS,

Plaintiff-Appellant,

-against-

KONKAR INTREPID CORP.,

Defendant-Appellee.



On Appeal from the United States District Court for the Southern District of New York

---

Appellant's Brief

LEBOVICI & SAFIR
Attorneys for Plaintiff-Appellant
15 Maiden Lane
New York, N.Y.
(212) 233-6165

HERBERT LEBOVICI
Of Counsel

Dick Bailey Printers, Inc., Tel.: (212) 447-5358

TABLE OF CONTENTS

CASES CITED

STATUTES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NECTARIOS KOUPETORIS, Plaintiff-Appellant,	Docket No. 75-7671
- against -	BRIEF FOR PLAINTIFF-APPELLANT
KONKAR INTREPID CORP., Defendant-Appellee.	

PROCEEDINGS BELOW

This is an appeal by the plaintiff from the decision and judgment of Judge MILTON POLLACK made October 31, 1975, granting summary judgment (59a - 67a)*

1. holding that the proofs were insufficient to raise a bona fide issue of fact as to the applicability of the Jones Act, and

2. declining jurisdiction of the claim pursuant to the general Maritime Law and the alternate claim under the Liberian Law as such law incorporated the non-statutory general Maritime Law of the United States.

---

* Reference is to the Appendix unless otherwise indicated.

ISSUES PRESENTED

Was summary judgment dismissing the complaint warranted where

1. Plaintiff made a showing of fact sufficient to create a bona fide issue as to the applicability of the Jones Act and the general Maritime Law?

2. The declination of jurisdiction of the claim pursuant to the Liberian law when such claim was coupled with the mandatory claim pursuant to the Jones Act?

3. Did the declination of jurisdiction comport with the doctrine of forum non conveniens as applicable to the facts of this case?

STATEMENT OF THE CASE

The complaint alleged a cause of action pursuant to the Jones Act (1a-4a) and/or the general Maritime Law, alleging substantial contacts "with the United States" to sustain such a cause of action (3a ¶ TWELFTH).

Alternatively, plaintiff alleged a cause of action under the law of the vessel's flag, the Liberian Maritime Law, incorporating by express provision of such law the non-statutory general Maritime Law of the United States (6a).

On July 16, 1975 defendant by motion returnable July 21, 1975 moved for judgment of dismissal claiming lack of jurisdiction over the person, the subject matter and alleging forum non conveniens (8a).

On July 21, plaintiff had yet had no opportunity for any discovery, although the deposition of one Sotirios Tselentis of defendant KONKAR MARITIME had been noticed. The deposition was taken on July 23, 1975 subsequent to the argument on July 21, 1975.

In support of the subject matter claim pursuant to the Jones Act plaintiff's proofs in opposition showed the following:

1. That the vessel KONKAR INTREPID was a bulk carrier under 8 year charter (31a-32a) to a GATX leasing corporation (36a), a subsidiary of GATX (36a) (General American Transportation Corporation) a corporation whose stock is publicly traded on the New York Stock Exchange.
2. That the charter hires of the vessel were collected monthly by the New York "agent" of the owner, KONKAR MARITIME and deposited in an account in New York (30-31a).
3. That from the charter hires of the vessel so collected were expended such expenses of the vessel as the shipowner was obligated to pay such as moneys advanced to the master, wages of the crew, expenses of the crew, for example, for medical attention and repatriation, the charges for

services and expenses of agents outside of New York, who billed the New York agent, KONKAR MARITIME, for such matters, commissions, charges and disbursements of KONKAR MARITIME itself (32a).

4. That under the time charter with GATX, many of the vessel's expenses were required to be paid by the charterer, and all the other expenses of the vessel not so paid by GATX were paid by KONKAR MARITIME from the charter hires collected by it (32a).

5. That the itinerary of the vessel produced on examination before trial showed that between March 26, 1974 and April 15, 1975 the vessel was in U.S. ports picking up or discharging cargo as follows:

New Orleans	3/26-4/3/74;
Houston	4/4 -4/6/74;
Baton Rouge	5/10-5/13/74;
Baltimore	7/21-7/24/74;
New Orleans	7/29-8/13/74;
Baltimore	10/11-10/14/74;
Norfolk	10/14-11/6/74;

Philadelphia	3/27-4/6/75
Norfolk	4/7-4/15/75

(See itinerary attached to Tselentis deposition - 98a.)

Obviously the vessel was engaged in "foreign commerce of the United States".

6. The defendant KONKAR INTREPID CORP. and the vessel were in fact commercial domiciliaries of the United States.

7. Though denied by Tselentis (89a), when examined before trial on behalf of KONKAR MARITIME, that the vessel was the subject of a mortgage, examination of the records of the Deputy Commissioner of Maritime Affairs for the Republic of Liberia in New York (the equivalent of the Collection of Customs for such purposes) revealed that on January 20, 1971, defendant KONKAR INTREPID CORP. executed a mortgage on the vessel to secure a borrowing from the Chase Bank in Manhattan of $3,960,000 and that on July 25, 1975 such mortgage was still unsatisfied (34a).

8. Likewise open and unsatisfied was a second preferred mortgage executed in New York City on July 22, 1971 to secure a letter of credit in the amount of $1,384,762 (35a).

9. The application for such letter of credit was signed in the following fashion:

Konkar Intrepid Corp.
N. Lyritzis
17 Battery Pl.
New York, N.Y.

thus indicating a New York address for the Liberian defendant KONKAR INTREPID CORP. (35a).

10. KONKAR MARITIME had the power to and on occasion appointed sub-agents ("husbanding" agents) at various ports when the needs of the ship required such sub-agents (61a).

11. The Southern District of New York is the only place in the world where plaintiff may have his Jones Act, General Maritime Law and even Liberian-United States general Maritime Law remedies. Greece, to where the defendant would have this case remitted, will not grant a remedy pursuant to the United States law, whether Jones Act or general Maritime, nor under the Liberian Law either, though that be the law of the vessel's flag (57a).

It is to be remembered that the Notice of Motion was served on July 16, 1975 and returnable July 21, 1975.

On the return day of this motion a notice to examine the

New York corporation, KONKAR MARITIME, was outstanding but the witness not yet produced. I court, Judge POLLACK stated that he wanted the motion disposed of by the end of the week (39a). The witness was produced and examined on July 23rd, but the transcript was not returned until almost two weeks later. Thus, the information provided by the deposition was rendered from the memories of both counsel (38a, 46a).

On August 29th, we received a copy of a letter from defendant's counsel to Judge POLLACK wherein counsel stated that he had gone about securing further information from Greece as requested by Judge POLLACK

1. In requesting an opinion as to whether the Greek courts would accept jurisdiction "over Mr. Koupetoris' cause of action", and
2. That counsel should secure additional proof that the shareholders of Konkar Intrepid Corp. are not citizens or residents of the United States (56a).

When these papers were in fact served on us, we pointed out to Judge POLLACK that a Greek court would not accord plaintiff the remedy he sought under the Jones Act or the general Maritime Law (57a). We further pointed out that the affidavits of a Greek lawyer which stated that a Greek court

have jurisdiction to provide a remedy indicated that Greek law would require a Greek domicile or principal place of business (58a). The first could in no event be provided since defendant is a Liberian corporation and the second was nowhere indicated in the new papers served.

It is further noteworthy that at the examination of KONKAR MARITIME, plaintiff requested the production of two significant records or documents, both admitted to be in the possession of KONKAR MARITIME - a copy of the charter party (9a, 76a) and a copy of the monthly accounting rendered by KONKAR MARITIME to KONKAR INTREPID (87a). These were never produced, although each were highly relevant as indicating the nature and extent of KONKAR INTREPID's activity in the United States through KONKAR MARITIME as well as the fact that the vessel was under charter to an American corporation, GATX.

It is respectfully submitted that withholding of the Court's determination of the motion until plaintiff has completed discovery that it had demanded and was entitled to have would have been appropriate. Federal Rules of Civil Procedure, 56(e) and (f).

POINT I

THE PLAINTIFF MADE A SHOWING OF CONNECTING FACTORS SUFFICIENTLY "SUBSTANTIAL" TO INDICATE A BONA FIDE ISSUE OF FACT AND SUMMARY JUDGMENT DISMISSING THE JONES ACT CLAIM WAS IMPROPER.

It is well established that the Jones Act (46 U.S.C.A. 688) will be applied to accidents occurring aboard a foreign flag vessel if the transaction has "substantial" contacts with the United States. Bartholomew v. Universe Tankships Inc. (Ca. 2) 263 F.2d 437, 440; Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306; Moncada v. Lemuria Shipping Corp., 491 F.2d 470; Voyiatzis v. National Shipping & Trading Corp., 199 F.Supp. 920; Pavlou v. Ocean Traders Marine Co., 211 F.Supp. 320 and many others.

Whether the contacts in a particular case are sufficiently substantial is itself a question of fact. Thus see Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 442-443:

> "[3] That the factors or contacts just discussed are in the aggregate substantial is clear beyond peradventure of doubt. No other conclusion is rationally admissible in the light of the decided cases. Uravic v. F. Jarka Co., 1931, 282 U.S. 234, 51 S.Ct. 111, 75 L.Ed. 312; Gerradin v. United Fruit Co., 2 Cir., 1932, 50 F.2d 927, certiorari denied 287 U.S. 642, 53 S.Ct. 92, 77 L.Ed. 556; Gambera v. Bergoty, 2 Cir., 1942, 132 F.2d 414, certiorari denied, 1943, 319 U.S. 742, 63 S.Ct. 1030, 87 L.Ed. 1699; Carroll v. United States, 2 Cir., 1943, 133 F.2d 690; Zielinski v. Empresa Hondurena de Vapores, supra.

"It is true that Lauritzen appears to stress the law of the flag as perhaps the most important factor, but we can perceive no indication whatever in Justice Jackson's opinion of an intention to repudiate the earlier cases just cited. And yet little short of the rejection of all of them would permit us to hold the Jones Act inapplicable in the case before us. Indeed, the discussion in Lauritzen does no more than establish the insubstantiality of the contacts present in that case.

"Moreover, this is not a matter resting in the discretion of the trial judge, as seems to have been thought to be the case here: The facts either warrant the application of the Jones Act or they do not." [Emphasis added.]

The lower court's finding that the only contact was the occurrence of the tort in the United States (64a) is clearly erroneous. Plaintiff's opposing affidavits and proof have shown (together with the source of plaintiff's knowledge) that all the defendant had to do with respect to the operation of this vessel, at the relevant times, was done for it by the New York corporation, KONKAR MARITIME. In the case of Pavlou v. Ocean Traders Marine Corporation, 211 F.Supp. 320, cited with approval by the Supreme Court in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 and by this Court in Moncada v. Lemuria, 491 F.2d 470, the operation of the alien shipowners' business by a corporation located in New York was held to be in itself a sufficiently "substantial"

factor to warrant application of the Jones Act.

It is true that this is denied by the moving affidavit (11a), but the affidavit is that of counsel. The affidavit gives no indication whatsoever as to the source of his information, and in fact states no evidence beyond the bare conclusion that "the shipowner is not doing business in New York State. It does not maintain offices in the United States and it has no salesman in New York or the United States." (11a). So also it states without source of knowledge or detail that "Konkar Maritime is not the shipowner's manager or general agent" (11a) and also that "the shipowner derives no income from the State of New York" (12a). This proof is palpably insufficient, since our courts still require proof by one with knowledge and the source of knowledge stated. Dresser v. The Sandpiper, (Ca. 2) 331 F.2d 130, 143. Affidavits are required to be made on "personal knowledge". Federal Rules of Civil Procedure 56(e).

Plaintiff has clearly shown enough to raise the issue as to whether the defendant KONKAR INTREPID was conducting its business through the instrumentality of KONKAR MARITIME.

At the very least therefore plaintiff has raised an

issue of fact requiring denial of defendants motion.

But this was not the end of plaintiff's proof. Thus it is not disputed that plaintiff's injury occurred in the United States at Baltimore (13a), a material circumstance if not a dispositive factor. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306; Voyiatzis v. National Shipping and Trading Co., Inc., 199 F.Supp. 920; Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 441.

As was noted in Hellenic Lines Ltd. v. Rhoditis, supra, and Pavlou v. Ocean Marine Traders, supra, the seven contacts listed in Lauritzen v. Larsen, 345 U.S. 571 are not the only contacts that may be shown and which are relevant.

In this case the plaintiff has shown not only the above but that the operation was financed by very substantial borrowing by the defendant KONKAR INTREPID from the Chase Manhattan Bank in the City of New York (34a-35a); also that the vessel was trading continuously to the United Staes (see itinerary). Five voyages terminating in the United States in the period of one year is as active an engagement in foreign commerce of the United States as the logistics of the business normally permit. So also treatment for the plaintiff's injury was initiated at Baltimore at the U.S.P.H.S. hospital there, and continued at New

Orleans, at which point in the United States further tort was committed by ceasing the treatment here and sending the plaintiff, still suffering, back to Greece.

While defendant's counsel, on a basis not appearing, alleges that defendant derived no income from the United States, the deposition of TSELENTIS shows that the only income the defendant received was what was left from charter hires received in the United States and deposited in New York after deduction of operating expenses by KONKAR MARITIME in New York (77a, 86a-87a).

It is respectfully submitted that at the least, these contacts, proven by plaintiff and not disproven by defendant, in the language of Bartholomew, supra, "add up to the necessary substantiality", 236 F.2d 441, to pose an issue of fact as to the applicability of the Jones Act.

Nor do the other assertinns of the moving papers indicate the contrary. Bartholomew, expressly held, that in the presence of "substantial" contacts, 263 F.2d 437:

> ". . . there is no occasion to consider and 'weigh' the contacts that do not exist, nor to go through any process of balancing one set of facts that are present against another set of facts that are absent."

Nor is defendant's allegation, even if true, that plaintiff had contracted to be bound by Greek law or for exclusive

jurisdiction in Greece weigh in the balance. If the Jones Act is applicable the provision is void. Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306; Krenger v. Penn Railroad, 174 F.2d 556; Pandazopoulos v. Universal Cruise Lines, Inc., 365 F.Supp. 208, 211; Voyiatzis v. National Shipping and Trading Corp., 199 F.Supp. 920, 925; Pavlou v. Ocean Traders Marine Corp., 211 F.Supp. 320, 322; Rodriguez v. Solar Shipping Ltd., 169 F.Supp. 79; Retzekas v. Vygla S.S. Co., 193 F.Supp. 259; Blanco v. Phoenix Cia. de Navegacion, S.A., 304 F.2d 13, 14, 15; Gomez v. Karavias U.S.A. Inc., 401 F. Supp. 104, 107.

The dismissal of the Jones Act cause of action was error and should be reversed.

POINT II

ASSUMING THE DISMISSAL OF THE JONES ACT CAUSE IMPROPER, IT WAS LIKEWISE IMPROPER TO DECLINE JURISDICTION OF THE GENERAL MARITIME LAW CLAIM AND THE LIBERIAN LAW CLAIM INCORPORATING THE GENERAL MARITIME LAW.

It is now well recognized that in the normal course, in the presence of a mandatory cause of action and one over which jurisdiction is discretionary, the court will keep the discretionary cause as well in order that there may be a complete disposition between the parties. Fitzgerald v. United States Lines, Inc., 374 U.S. 16, 21-22; Moncada v.

Lemuria Shipping Corp., (Ca. 2) 491 F.2d 470, 473; Bartholomew v. Universe Tankships, Inc., (Ca.2) 263 F.2d 437, 443-447; Troupe v. Chicago D & G. Bay Transit Co., (Ca.2) 234 F.2d 253, 257-258; Bobolakis v. Compania Panamena Maritima (S.D.N.Y.) 168 F.Supp. 236, 239; Voyiatzis v. National Shipping & Trading Corp., (S.D.N.Y.) 199 F.Supp. 920, 926. The rationale for so holding is so extensively discussed in the cases cited, as not to warrant further discussion by this writer, assuming that the dismissal of the Jones Act claim will be reversed.

POINT III

WHETHER OR NOT JURISDICTION OVER THE GENERAL MARITIME LAW CLAIMS (PURSUANT TO UNITED STATES OR LIBERIAN LAW) SHOULD BE RETAINED BECAUSE PENDANT TO A JONES ACT CLAIM, IN THE INTEREST OF JUSTICE, EQUITY AND FAIRNESS, THE JURISDICTION SHOULD HAVE BEEN RETAINED IN THE EXERCISE OF CUSTOMARY FORUM NON CONVENIENS PRINCIPLES.

Assuming arguendo that the law stated in POINTS I and II is not as there claimed, it is nevertheless respectfully submitted that the claims, as general Maritime Law or Liberian Maritime Law incorporating the United States non-statutory general Maritime Law claims, should in any event be retained, and the declination of jurisdiction pursuant to the doctrine of forum non conveniens reversed. The principles of justice, right and equity, as they appear in

this record, it is respectfully submitted, so require.

In the recent case of Mobil Tankers Company v. Mene Grande Oil Company (Ca.2) 363 F.2d 611, this Court stated at page 613:

> "[6,7] The doctrine of forum non conveniens, while rather simple in principle does not lend itself to meaningful generalization when its application to concrete situations is attempted. However, the invocation of the doctrine is governed by the criteria established in a long line of decisions. Although neither a case in admiralty nor one involving foreigners, Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055 (1947) is relevant insofar as it provides such criteria."

On the same page (363 F.2d 613) the Court stated:

> "The ultimate inquiry is whether the retention of jurisdiction by the district court would best serve the convenience of the parties and the ends of justice."

The motion papers on which the application was granted below, claim no unusual inconvenience, other than that attached to the ordinary defense of a law suit, not characteristic of any other maritime claim. The defendant shows no inconvenience in the legal sense. What appears however is forum shopping by defendant to get plaintiff into a jurisdiction wherein he will be clearly disadvantaged.

Indeed, while the application was pending below, defendant took the deposition of an eyewitness, on short notice, with the co-operation of plaintiff's counsel. All witnesses to the case are seamen whose testimony is just as likely to be

securable here as anywhere else in the world.

It is not claimed, as suggested in Gulf Oil v. Gilbert, 330 U.S. 501, 507 ("still relevant as providing criteria" 336 F.2d 611) that the plaintiff's choice of forum results from any harassment of or effort to harass defendant.

It is not claimed that any difficult problem of foreign law is concerned since no court, save the Supreme Court of the United States, is more competent to interpret or pass upon issues concerned with the non-statutory law of the United States. Kontos v. The Sophie C (E.D.Pa.) 184 F.Supp. 835, 837, aff'd 288 F.2d 437. The further statement of Judge Goodrich in Kontos that we do not know ". . . whether a Greek court would take jurisdiction over matters concerning a Liberian ship" is relevant. We now know that a Greek court will not, even should it take the case, render a judgment pursuant to either the Liberian law or the general Maritime Law or the Jones Act. In violation of the law of the flag (Tsaoyssides v. M/V Mar Star, 372 F.Supp. 74) a Greek court will not apply such maritime law (57a).

Nor is it an answer to say, as is herein implicit in the lower court decision, that even if you don't have the remedy you say is applicable (Jones Act, general Maritime Law or Liberian law) you will get a "remedy" under Greek law. Thus Judge Croake noted in Pavlou supra at page 322:

> "It is quite another matter to contend that a litigant who has a right created under the laws of the United States may, because of facts and circumstances related to convenience and problems of proof, be relegated to a forum outside of this country."

The statement is equally true if applied (in this case) to the Liberian law remedy pleaded. So too, is relevant, the finding of Judge Hoffman in the case of Perdikouris v. TSS Olympos, 196 F.Supp. 849, 853:

> "The seaman may be a ward of admiralty in the United States, but the shipowner occupies this position in Greece."

Contrary to the statement of the lower court with respect to the contacts with the United States (64a) the contacts shown by evidence admissibly provable of the contacts present is such as to militate in favor of retaining the case. Even so, the declination when the defendant had failed to provide documents that may have enhanced the proof of contacts (37a), and before the plaintiff had the opportunity to complete discovery was unfair. Grammenos v. Lemos, 457 F.2d 1069-1070. Also erroneous in this respect was the lower court statement that the defendant had submitted "uncontroverted evidence"* that the corporate shareholders were

---

* That the defendants "principal place of business was in Athens" (64a) is expressly controverted by better proof (Pp. 3-6 this brief, items 2-10).

all citizens and residents of Greece (63a). The defendant's affidavits in such respect were only submitted, after being solicited by Judge Pollack (47a-55a), after all papers were in, and with no opportunity to investigate or verify their truth or lack of it.

In the language of the Mobil Tankers case, 363 F.2d 611, 613 repeating Gulf Oil v. Gilbert,

> "Unless 'the balance is strongly in favor of the [respondent], [the libelant's] choice of forum should rarely be disturbed'."

The defendant has not even sustained its burden of proof on such an application, Gulf Oil v. Gilbert, 330 U.S. 501, 508. What is there about the affidavits of counsel for defendant, made on no personal knowledge whatsoever, that overbalanced the detailed proof on plaintiff's side?

Nor is it amiss to suggest that the rights sought to be enforced under the Maritime Law, as indeed with the Jones Act also, are affected with the public interest of the United States. Blanco v. Phoenix Compania de Navegacion, 304 F.2d 13, 15. Nor have the courts yet to depart from the statement of this Court in The Falco, 20 F.2d 362, 363:

> "[3,4] Normally disputes arising out of a seaman's employement are referred to the"

"tribunals of the flag.* The Ester (D.C.) 190 F.216. Nevertheless, courts of admiralty, which are sensitive to a seaman's rights, or at least have always professed to be, will in such cases, before turning him out of court, satisfy themselves that there are no special circumstances which will leave him without adequate remedy. The Becherdass Ambaidass, Fed. Cas. No. 1,203; Willendson v. Forsoket, Fed. Cas. No. 17,682; The St. Oloff, Fed. Cas. No. 17,357; The Topsy (D.C.) 44 F. 631; The Sirius (D.C.) 47 F.825; The Ester (D.C.) 190 F. 216."

If justice and fairness be hallmarks of the doctrine of forum non conveniens jurisdiction of this case should be retained. To remit this plaintiff to an unfriendly forum, where he cannot prosecute the claims granted by Congress and the law of the flag, constitutes a denial of justice.

CONCLUSION

THE DECLINATION OF THE LOWER COURT SHOULD BE REVERSED, IN WHOLE OR IN PART, AND THE MATTER REMANDED TO THE DISTRICT COURT FOR FURTHER PROCEEDINGS.

LEBOVICI & SAFIR
Attorneys for Plaintiff-Appellant

HERBERT LEBOVICI
Of Counsel

---

* In this case, the law of the flag [Liberia] expressly requests that jurisdiction be retained stating: "Section 33 . . . except as otherwise provided in this Title, the provisions of this section shall not be deemed to deprive other courts, of Liberia or elsewhere, of jurisdiction to enforce such causes of action." (6a)

LEROVICI Koupetoris v. Konkar

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

ROBERT BAILEY, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 12 day of Jan. 1976 deponent served the within Brief upon:

KIRLIN, CAMPBELL & KEATING, ESQS.

attorney(s) for

Appellee

in this action, at

120 Broadway, New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Robert Bailey

Robert Bailey

Sworn to before me, this 12
day of Jan., 1976.

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976